

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

ORIGINAL
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OF SERVICE

76-7627

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

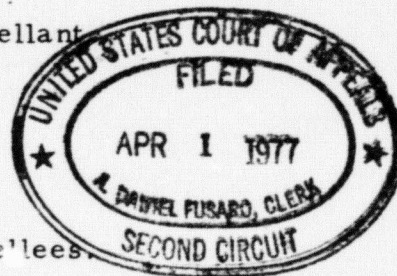
STEVEN PAUL KESSLER,

Plaintiff-Appellant

v.

LAWRENCE A. WIEN, et al.,

Defendants-Appellees.



Appeal from the United States District Court
for the Southern District of New York

REPLY BRIEF FOR APPELLANT

STOTSENBURG & DONOHUE, P.C.

4401 Chanin Building
122 East 42nd Street
New York, New York 10017

ATTORNEYS FOR APPELLANT

Of Counsel:

R. Alan Stotsenburg

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REPLY BRIEF FOR APPELLANT

1. This Court's jurisdiction is properly invoked under the death knell doctrine

Jurisdiction of this appeal exists pursuant to 28 U.S.C. § 1291 under the death knell doctrine. Eisen v. Carlisle & Jacquelin, 370 F.2d 119 (2d Cir. 1966), cert. denied, 386 U.S. 1035 (1967).

It is clear that the value of plaintiff's claim is for a dollar amount similar to the \$75 claim which gave rise to death knell jurisdiction in Eisen, supra, and the \$386 claim which was also held to satisfy that standard in Korn v. Franchard Corp., 443 F.2d 1301 (2d Cir. 1971).

Plaintiff's uncontradicted affidavit of November 10, 1975 in support of his cross-motion for class certification states:

3. Prior to my receipt of a letter dated April 10, 1975 on the letterhead of Wien, Lane & Malkin, Counsellors at Law, soliciting my consent to a mortgage refinancing and a modification of the net lease of Associates (the "April 10 letter"), I had been receiving a check in the amount of \$95.83 a month as my investment return on these Interests. I also received a \$95.83 check in May 1975. Beginning in June 1975 and for the months of July, August, September and October, 1975, I received a monthly check of \$66.66 as my investment return on these Interests.

5. Since the date of the October 16, 1975 letter, I have received no checks from Associates.

Affidavit of Steven P. Kessler,
Sworn November 10, 1975, filed
in support of Cross-Motion for
Class Certification dated Nov. 10, 1975.

It does not take a financial wizard to calculate that plaintiff

has sustained the following lossess as a result of the plan:

July 1975	\$29.17
August 1975	29.17
September 1975	29.17
October 1975	29.17
Each month thereafter	95.83

On an annual basis, therefore, plaintiff's losses amount to \$1,149.96. Plaintiff's total losses through April 1, 1977 amount to \$1,745.79.

This figure does not begin to approach the \$7,482 figure which this Court held precluded death knell review in Shayne v. Madison Square Garden Corp., 491 F.2d 397 (2d Cir. 1974).

Thus the record squarely establishes the uncontradicted amount of plaintiff's damages at a figure which permits the death knell jurisdiction of this Court to be invoked.

2. Plaintiff and all the members of the proposed class have an identical interest

Defendants are incorrect in urging that plaintiff has a different interest than the other security holders whom he seeks to represent. To the contrary, plaintiff and all the holders of the security in question (Interests in 250 West 57th Street Associates) have the same objective: to restore Associates to profitability. Associates will be profitable with tenants in the building it owns who are paying rent. After deducting expenses, this rental income should come to plaintiff and each member of the proposed class.

But defendant Fisk Building Building Associates (Fisk)

is interposed between tenants and all the members of the proposed class, including plaintiff. The April 10 letter which is the subject of this action proposed a new contract between Fisk and Associates (and thereby with each member of the proposed class, including plaintiff). As a result of this new contract (a net lease), after receiving four monthly payments at a reduced rate of \$66.66, each and every member of the proposed class, including plaintiff, is receiving nothing.

Defendants assert that plaintiff's interest is antagonistic to the demonstrated interest of the class. But the class has not demonstrated what its interest is since it was given a fraudulent and misleading proxy statement soliciting their consent to the revised net lease with Fisk.

In every respect the interest of plaintiff and the members of the proposed class is identical and the defendants, who are fiduciaries for all of them, must be held to have known this.

In seeking to obtain an honest and truthful proxy statement for his fellow security holders, plaintiff has shown that he possesses the necessary qualifications as a class representative.

Dated: New York, New York
March 28, 1977

Respectfully submitted,
STOTSENBURG & DONOHUE, P.C.

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122 East 42nd Street
New York, New York 10017
212/986-2500

Of Counsel:

R. Alan Stotsenburg

ATTORNEYS FOR APPELLANT

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss .

THEODORE RICHMAN, being duly sworn,
deposes and says that deponent is not a party to the action,
is over 18 years of age and resides at 1361 EAST 88th ST
BROOKLYN, N.Y.

That on the 1st day of APRIL, 1977,
deponent personally served the within REPLY BRIEF FOR
APPELLANT
upon the attorneys designated below who represent the
indicated parties in this action and at the addresses below
stated which are those that have been designated by said
attorneys for that purpose.

By leaving 2 true copies of same with a duly
authorized person at their designated office.

~~By depositing true copies of same enclosed~~
in a postpaid properly addressed wrapper, in the post office
or official depository under the exclusive care and custody
of the United States post office department within the State
of New York.

Names of attorneys served, together with the names
of the clients represented and the attorneys' designated
addresses.

PAUL WEISS RIFKIND WHARTON & GARRISON
345 PARK AVE.
NEW YORK, N.Y. 10022
ATTORNEYS FOR APPELLEES (EXCEPT 250 WEST 57th ST ASSOC)

WIEN, LANE & MALKIN
60 EAST 42nd ST.
NEW YORK, N.Y. 10017
ATTORNEYS FOR APPELLEE
250 WEST 57th STREET ASSOCIATES

Theodore Richman

Sworn to before me this

1st day of April, 1977
Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Queens County
Commission Expires March 30, 1979